tors to the defendants' solicitors demanding payments of these sums of money were ignored and the assumption is that they did not want to dispute the reasonableness of the plaintiffs' claim – *Runnacles* v. *Mesquita*:[3]

The defendants in their various affidavits did not specifically dispute the amounts claimed by the plaintiffs although the plaintiffs' writ of summons was specially indorsed with a claim for a specific sum of money – *i.e.* $1,114,361.85 as against both the second and third defendants, and a further sum for $23,497.80 as against the second defendants. For that reason I would treat the amounts claimed by the plaintiffs as liquidated damages so that when I subsequently dismissed the application of the second defendants to set aside the default judgment, I did not vary the senior assistant registrar's order to one of "judgment by default of defence with damages to be assessed".

The third defendant's ground in supporting his application to set aside the default judgment was that he was not liable as a guarantor of the second defendants unless the second defendants were found liable to the plaintiffs to pay the amounts claimed.

The default judgments against both the second and the third defendants had been regularly obtained by the plaintiffs. I have found no facts disclosing any defence or raising a triable issue, and further that the long delay by the second defendants in making this application had caused prejudice to the plaintiffs. I therefore dismissed the second and the third defendants' applications to set aside the default judgments.

As regards the application of the plaintiffs to set aside the order dated May 26, 1984 to stay the execution of the garnishee order, that order of stay was to operate pending the hearing and decision of the court on the applications to set aside the default judgments by the second defendants.

Since I have dismissed the applications to set aside the default judgments made by the second and third defendants, I then allowed the plaintiffs' application to set aside the order dated May 26, 1984.

I ordered the second and third defendants to pay the costs of these applications.

*Order accordingly.*

Solicitors: *Shearn Delamore & Co.*; *Nijar & Nijar.*

## TAN GEOK KHOON & GERARD FRANCIS ROBLESS v. PAYA TERUBONG ESTATE SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) May 11, 1987]

[Penang – Civil Suit No. 831 of 1984]

*Contract – Offer and acceptance – Correspondence between the respective parties – Whether there was a contract – Remedies available.*

In this case, the main issue for decision was whether there was a contract for the sale of a certain piece of land. The plaintiffs are the executors and trustees of the estate of Tan Tye Chek (the deceased) who died on May 22, 1981. This action was brought against the defendants, Paya Terubong Estate Sdn. Bhd. The plaintiffs claimed that through a series of correspondence made between the plaintiffs and defendants a contract was concluded.

**Held**: (1) in the present case through the crucial letters a contract was concluded;

(2) in the circumstances of the present case, nominal damages should be awarded for the plaintiff.

*Cases referred to:*

(1) *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294.
(2) *Hyde* v. *Wrench* (1840) 3 Beav. 334; 49 E.R. 132.
(3) *Trollope & Colls Ltd.* v. *Atomic Power Constructions* [1962] 2 All E.R. 1035.
(4) *Van Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 288, 289.
(5) *Rossiter* v. *Miller* (1877-78) 3 App. Cas. 1124, 1143.
(6) *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.
(7) *Cavallari* v. *Premier Refrigeration Co. Ltd.* (1952) 85 C.L.R. 20, 25.
(8) *Erdie* v. *Addison* (1883) 52 L.J. 80, 82.
(9) *Harichand* v. *Govind* (1923) L.R. 50 I.A. 25.
(10) *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin* [1967] 2 M.L.J. 174.
(11) *Johnson* v. *Agnew* [1980] A.C. 367.
(12) *Malhotra* v. *Choudhury* [1980] Ch. 52.
(13) *Datuk Jagindar Singh & Ors.* v. *Tara Rajaratnam* [1986] 1 M.L.J. 105.
(14) *Bonham-Carter* v. *Hyde Park Hotel* (1948) 64 T.L.R. 177.
(15) *Ashcroft* v. *Curtin* [1971] 1 W.L.R. 1731 (C.A.)
(16) *Beaumont* v. *Greathead* (1846) 2 C.B. 494, 499; 135 E.R. 1039.
(17) *The Mediana* [1900] A.C. 113.
(18) *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Industries Ltd.* [1951] 1 All E.R. 873.

CIVIL SUIT.

*R. J. Manecksha* for the plaintiffs.

*Lim Cheng Poh* for the defendants.

*Cur. Adv. Vult.*

**Edgar Joseph Jr. J.**: Whether or not a contract has been made by a valid offer and acceptance

during the course of correspondence can sometimes be a question not free from difficulty. The conventional approach to this question in the words of Lord Diplock in *Gibson* v. *Manchester City Council*[1] is that of "looking at the handful of documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer to sell ... and an acceptance of that offer ...". It is this approach which I propose to adopt in determining the primary issue which arises for decision in this case.

This brings me to a consideration of the particular circumstances of this case.

The plaintiffs are the executors and trustees of the estate of Tan Tye Chek ("the deceased") who died on May 5, 1981 and have brought this action against the defendants, Paya Terubong Estate Sendirian Berhad, an incorporated family company, for specific performance of what is claimed to be a contract for sale of 20 acres of land comprised in part of what was originally Lot 59(1), later re-numbered Lot 2552 Mukim 13, North East District, Penang, but which is now part of Lot 3440 ("the land concerned") at the price of $3,000 per acre.

By way of background, certain facts must be mentioned.

According to the unchallenged evidence of Haji A. Kassim bin Mohd. Hussein, a licensed appraiser and valuer, who was familiar with all the lands of the defendants, Lot 2552 was originally 442.138 acres in area but the state government had acquired 192.028 acres of it. The unacquired portion was later sub-divided into three lots, namely, Lot 3439 in area 144.1 acres, Lot 3440 in area 44.18 acres and Lot 3441 in area 61.83 acres. The land concerned, as I have already mentioned, was an undivided portion of Lot 3440 in area 20 acres.

This witness expressed the view that as Lot 3440 was subject to the provisions of the Land Conservation Act 1960, it would not be possible to subdivide it into two lots of 20 acres and 24.18 acres. He explained that this was because it was "hill land" and that it was the practice of the Land Authority to refuse applications for subdivision of such land. He gave a further reason why it would not be possible to subdivide Lot 3440 into two lots; this was because there would be no access. Amplifying this part of his evidence, he pointed out that the land adjoining Lot 3440 to the north and west was state land which had been acquired by the state government before World War II.

Under cross-examination, the witness was asked whether it would be possible for the land concerned to be excised and he replied that this would depend on the State Executive Committee which would act on the advice of the State Planning Authority.

So much for the history of the land concerned. It is now necessary to mention the deceased's interest in Lot 2552 prior to the acquisition of part of it by the state government and prior to the correspondence which gave rise to the dispute the subject of this action.

This brings me to the testimony of Mrs. Jessie Lebroy, the managing director of the defendants, at the time of the hearing and a director at all material times to this suit.

She testified that the defendants were a family company established by her grandfather, Foo Choo Choon, and that after his death his children and grand-children became its directors and shareholders. Until today, no outsider has been admitted either as director or shareholder and that it was not the policy of the company to do so in the future.

It would appear from the evidence of this witness that the deceased had been well acquainted with the land concerned, for long before the events which gave rise to the dispute, the subject of this action, he had been granted a lease under an indenture dated April 6, 1959 over part of Lot 59(1) and Lot 59(4) which then were under *blukar*. By the terms of this indenture, the deceased was to plant the whole of the demised land with rubber and to keep and maintain it at his own expense. He was also required to pay the defendants 7½% of the gross proceeds of sale of the rubber sold but he was entitled to keep for himself the replanting cess grants made by the relevant authority. It would appear that when in 1975 the state government acquired part of Lot 2552 it paid the deceased, direct, a sum of $405,784 by way of compensation in respect of his interest therein. The defendants were not happy about this as they felt that being the owners the payment ought to have been made not to the deceased but to them direct and Mrs. Lebroy has testified that the validity of this payment is being challenged.

In order to elucidate the issues which arise for decision, I must now reproduce the crucial contemporary documents, including the correspondence in the case, showing what they say.

There was first of all a letter dated January 17, 1978 from the deceased addressed to the defendants (being ex. G2 to en. 6) which was in the following terms:

"Tan Tye Chek
31-C, Jalan Ayer Itam,
Mk. 13, Penang

17th January, 1978

Paya Trubong Estate Sdn. Berhad,
68, Beach Street,
Penang

*Deposit for Purchase of 20 acres*
*59(1) & 59(4) pts.*

Enclosed is cheque for $6,000 being 10% for the purchase of 20 acres or thereabouts at $3,000 per acre and without' prejudice to my rights for compensation for sale of leased lands.

Yours faithfully,
sgd. Tan Tye Cheak"

It is noteworthy that the subject heading of this letter mentions "Deposit for purchase of 20 acres 59(1) & 59(4)". According to the affidavit of Mrs. Jessie Lebroy affirmed to on April 18, 1985 (en. 10) filed in opposition to the plaintiff's application for summary judgment for specific performance under Order 81 of the Rules of the High Court, Lot 2552 was part of old Lot 59(1). It should also be noted that the deceased had stated that he was paying the deposit of $6,000 "without prejudice to his right for compensation for sale of leased lands".

This letter from the deceased evoked the following response from the defendants' secretary who wrote a letter on the defendant company's note paper (see AB page 1) dated January 17, 1979, referring in unambiguous terms to the land concerned as follows:

"Paya Trubong Estate Sendirian Berhad
(Incorporated in the Fed. of Malaya)

Secretary:
Ong Huck Tuan
Penang
Tel. No. 61680 (Office)
Tel. No. 61630 (Hse)

Registered Office:
6-B, Beach Street
Penang

Managing Director:
Foo Meow Fong
Penang
Tel. No. 65235 (Hse)

17th January, 1979

Received from Mr Tan Tai Chek the sum of $6,000 being deposit for purchasing part of Lot 2552 for approximately 20 acres at price as mutually agreed as per plan attached.

Paya Trubong Estate (Sdn.) Bhd.

Sgd.

.....
Secretary"

I would interpolate to remark that the plan referred to in the defendants' secretary's letter was not drawn to scale and although some criticism has been levelled against it by counsel for the defendants it seems clear that essentially speaking the hatched area shown therein does refer to the land concerned.

The letter from the defendants' secretary was followed up some five months later by a letter from their solicitors dated June 20, 1979 which was in the following terms:

"A.R. REGISTERED

20th June, 79

Mr. Tan Tai Chek,
31-C, Ayer Itam Road,
Penang.

Dear Sir,

Re: Part of Lot 2552 Mukim 13
N.E.D. Penang (20 acres)

We act for Paya Terubong Estate Sdn. Bhd.

We have been informed by our clients that you have on the 17th day of January 1979 paid a sum of $6,000 to them purporting to be payment of deposit for the purchase of the above property.

Our clients now instruct us to inform you which we hereby do, that they do not accept the deposit. You are to make payment of the full purchase price forthwith if you wish to buy the above property.

We are further instructed to state that unless you comply with the above demand to pay the whole purchase price within fourteen (14) days from date hereof our instructions are to take the necessary action to annul any agreement made between our clients and your goodself.

Yours faithfully,
sgd.

c.c.
1. Paya Terubong Estate Sdn. Bhd.,
No. 6-B, Beach Street,
Penang.
2. Mr. Foo Meow Fong,
4-Cantonment Avenue,
Penang."

A little more than one month later, more precisely on July 23, 1979 which was after expiry of the 14-day period limited in the above letter, the deceased paid the balance of the purchase price of $54,000 to the defendants' solicitors who, on the same day, wrote as follows:

"Our Ref: PTO/KY/PTEst.
Your Ref: ... 23rd July, 79

Paya Terubong Estate Sdn. Bhd.,
No. 6-B, Beach Street,
Penang,

Dear Sirs,

Re: Part of Lot 2552 Mukim 13 N.E.D.
Penang (20 acres)

We forward you herewith a cheque for $54,000 drawn on the Malayan Banking Bhd. (Cheque No. 828239) which we received today from Mr. Tan Tai Chek being payment of the balance of the purchase price in respect of the above property.

For your information we would like to inform you that that a deposit of $6,000 was paid to you by Mr. Tan Tai Chek on 17th January 1979.

Kindly forward us your formal receipt in favour of Mr. Tan Tai Chek in due course.

We have been instructed by Mr. Foo Meow Fong to draft the agreement for sale and the same will be forwarded to you for your approval as soon as the same is ready.

Kindly acknowledge receipt.

Yours faithfully,
sgd.

c.c.
Mr. Foo Meow Fong,
No. 4 Cantonment Avenue,
Penang.

Mr. Tan Tai Chek,
No. 31-C, Ayer Itam Road,
Penang."

The defendants' response was to issue a receipt dated July 23, 1979 on the note paper signed by a director which read:

"Penang, 23rd July 1979

Received from Mr. Tan Tye Chek of 31-C, Ayer Itam Road, Penang the sum of Dollars Fifty Four Thousand ($54,000.00) only being payment of the balance for purchasing part of Lot 2552 for approximately 20 acres.

Paya Trubong Estate (Sdn.) Bhd.

sgd.

.....
Directors

Malayan Bkg. Bhd., Penang
cheque No. 828239"

But, then, it would seem rather unexpectedly, the defendants' solicitors wrote to the deceased a letter dated August 20, 1979 refunding the sum of $60,000 "as no agreement of sale was entered into". Most particularly, that letter was in the following terms:

"Our Ref: PTO/Ky/PTEst.
Our Ref: .....
ENCL. 20th August, 1979

Mr. Tan Tye Chek,
No. 31-C, Ayer Itam Road,
Penang.

Dear Sir,

Re: Part of Lot 2552 Mk. 13 N.E.D.
Penang (20 acres)

We write to inform you that Paya Terubong Estate Sdn. Bhd. have forwarded us a cheque for $60,000 being refund of the purchase price in respect of the above property as no agreement for sale was entered into between your goodself and our clients.

We now forward you herewith our cheque for $60,000 being the refund of the purchase price, receipt of which kindly acknowledge.

Yours faithfully,
sgd.

c.c.
Paya Terubong Estate Sdn. Bhd.,
No. 6-B, Beach Street,
Penang."

The solicitors for the deceased returned the cheque for $60,000 to the defendants' solicitors and retorted by a letter dated August 28, 1979 in the following terms:

"AJ/IL/79/721A
PTO/Ky/PTEst. 28th August, 79

To:

M/s Lim, Lim & Oon,
Advocates & Solicitors,
Penang

Dear Sirs,

Re: Sale of Land part of Lot 2552,
Paya Terubong Estate

We act for Mr. Tan Tye Chek of No. 31-C, Ayer Itam Road, Penang. Our client has handed to us your letter dated 20th instant with instructions to reply thereto.

Our client states that your clients by their director, Mr. Foo Meow Fong offered to sell our client part of Lot 2552 in Paya Terubong Estate for approximately 20 acres at the price of $3,000 per acre as per plan of the land shown to our client. On 17th January, 1979 our client paid a deposit of $6,000 to your clients and a receipt was issued to our

client with the plan of the land annexed showing the portion sold to our client. This agreement was confirmed by your clients by letter dated *12th April, 1979.*

Later by your letter dated *20th June, 1979* you requested for payment of the balance of the purchase price. Our client paid to you the sum of $54,000 being the balance of the purchase price and he was issued with a receipt dated 23rd July, 1979 for the said sum of $54,000 by your clients.

The sale is therefore complete and no further agreement is necessary for execution by the parties. Our client is waiting for your clients to effect the transfer of the portion of the land sold to our client.

We are therefore instructed by our client to return to you your cheque for $60,000 and inform you that he wants specific performance of the contract of sale.

Yours faithfully,
sgd.

Encl:–
c.c. to client"

The defendants' solicitors once again returned the cheque for $60,000 to the solicitors for the deceased accompanied by the following letter dated May 21, 1980:

"Our Ref: PTO/KY/PTEst.
Our Ref: AJ/IL/79/721A
*ENCL* 21st May, 1980

Jayadeva & Kamal,
Advocates & Solicitors,
No. 21 Church Street,
Penang.

Dear Sirs,

Re: Sale of Lot 2552 (Pt) Mk. 13
N.E.D. Penang (approx. 20 acres)

With reference to your letter of the 25th August 1979, we have now been instructed by our clients to refund the sum of $60,000 (Cheque No. 209723 drawn on Overseas Union Bank Ltd. Penang and made payable to Mr. Tan Tye Chek) as the directors of Paya Terubong Estate Sdn. Bhd. do not agree to the sale of the above property to your client Mr. Tan Tye Chek.

Kindly acknowledge receipt.

Yours faithfully,
sgd.

c.c.

1. The Secretary,
Paya Terubong Estate Sdn. Bhd.,
No. 6-B, Beach Street,
Penang.
2. Mr. Foo Meow Fong,
No. 4, Cantonment Avenue,
Penang"

The solicitors for the deceased were not daunted; they once again sent the cheque for $60,000 to the defendants' solicitors which they enclosed with their letter dated May 29, 1980 which read as follows:

"AJ/IL/80/721A
PTO/KY/PTEst. 29th May, 80.

To:

M/s Lim, Lim & Oon,
Advocates & Solicitors,
Penang.

Dear Sirs,

Re: Sale of Lot 2552 (Pt) Mukim
13 N.E.D. Penang (approx. 20 Acres)

We have taken our client's instructions to reply to your letter dated 21st instant. Our client states that he has completed the purchase of the part of Lot 2552 Mukim 13, N.E.D., Penang for an approximate area of 20 acres. The deposit of $6,000 was paid to and received by your clients on 17th January, 1979. Later, the balance of the purchase price amounting to $54,000 was paid to and received by your clients on 23rd July, 1979. In this respect, we refer you to our letter dated 28th August, 1979 which we sent to you in reply to your letter dated 20th August, 1979.

Since our client has paid the whole of the purchase price, your clients are estopped from stating that the directors of Paya Terubong Estate Sdn. Bhd. do not agree to the sale of the above property to our client.

Our client does not accept the refund of the purchase price. We therefore return to you your cheque for $60,000. Our client intends to institute legal proceedings against your clients for the transfer of the portion of the said property.

Yours faithfully,
sgd."

The defendants' solicitors replied somewhat belatedly by letter dated June 10, 1980 stating that the agreement had been cancelled "by reason of the failure on the part of the deceased to pay the balance purchase price before July 4, 1979". It added that no agreement had been entered into by the parties. Most particularly, the reply was in the following terms:

"Our Ref: PTO/KY/PTEst.
Your Ref: AJ/IL/80/721A
10th June, 1980.

Jayadeva & Kamal,
Advocates & Solicitors,
No. 21 Leboh Gereja,
Penang

Dear Sirs,

Sale of Lot 2552 Pt. Mk. 13 N.E.D.
Penang (approx 20 acres)

We are in receipt of your letter of the 2nd May 1980 and apologise for the delay as the writer was away.

Our clients will refer you to our letter of 20th June 1979 addressed to your client and our letter of 23rd July 1979 addressed to Paya Terubong Estate Sdn. Bhd. copied to your client.

Kindly note that any agreement made between our respective clients has been cancelled by your client's failure to comply with the request to pay the balance of the purchase price before 4th July 1979.

Kindly also note that no agreement was entered our respective clients.

Yours faithfully,
sgd.

c.c.

1. Paya Terubong Estate Sdn. Bhd.,
No. 6-B, Beach Street,
Penang.

2. Mr. Foo Meow Fong,
No. 4 Cantonment Avenue,
Penang

The rules governing the resolution of a dispute of this sort are the traditional ones set out as far back as 1840 by Lord Langdale M.R. in *Hyde* v. *Wrench*[2] and applied by Megaw J. in *Trollope & Colls Ltd.* v. *Atomic Power Constructions*[3] and, of course, by Lord Diplock in *Gibson* v. *Manchester City Council*[1] to which I referred in the opening paragraph of this judgment.

It is with these rules in mind that I turn to analyse and construe the contemporary documents.

The deceased started by making an offer when he wrote and sent the letter dated January 17, 1979 offering to buy certain land, namely, 20 acres, being an undivided portion of Lots 59(1) and 59(4), the property of the defendants at a price of $3,000 per acre. It will be recalled that part of Lot 59(1) was Lot 2552 which in turn had been subdivided into three lots, being Lots 3439, 3340 and 3341. This offer was made expressly "without prejudice to [his] right to compensation for sale of leased lands".

That this offer was not accepted is clear from the defendants' secretary's letter dated January 17, 1979 written on the company's note paper acknowledging receipt of the $6,000 as a deposit for purchase not of 20 acres of Lots 59(1) and 59(4) but for 20 acres of Lot 2552, that is, the land concerned illustrated by an accompanying sketch. The letter also suggests that by then there might have been an antecedent oral agreement for it states categorically "at price as mutually agreed".

The solicitors for the defendants then wrote to the deceased their letter dated June 20, 1979, the gist of which was that the defendants did not accept the purported deposit of $6,000 for the purchase of the land concerned but, nevertheless, offering to sell the same if the whole purchase price was paid within 14 days, failing which "they had instructions to annul any agreement made ..." Assuming, in the defendants' favour, that there was no longer, at that stage, a binding agreement, I would construe this letter, at the very least, as a counter offer.

The deceased then accepted the counter offer, at the same time making payment of the balance of $54,000, though somewhat belatedly, on July 23, 1979 since this was after the expiry of the 14 days' time limit imposed by the defendants' solicitors' letter dated June 26, 1979. But, the fact remains that the defendants did accept the payment of this balance when their solicitors forwarded it to them by their letter dated July 23, 1979 ending with the significant statement "we have been instructed by Mr. Foo Meow Fong to draft the agreement for sale and the same will be forwarded to you for approval as soon as the same is ready". Mr. Foo, it will be recalled, was then the managing director of the defendants.

The defendants' response to this letter was to issue a receipt on its note paper signed by one of its directors, dated the same day, acknowledging that the $54,000 was payment of the balance of the purchase price for the land concerned. That was when, in my opinion, the contract was made; the parties were *ad idem* as to the terms of the contract so that at this moment of time the agreement was unconditional. I would treat the reference in the defendants' solicitors' letter dated July 23, 1979 addressed to the defendants about the drafting of an agreement of sale as merely the expression of a desire to have the agreement put into due form by a solicitor; as such this could be ignored. In support, I would refer to the following passage in the judgment of the court in *Von Hatz Feldt-Wildenburg* v. *Alexander*:[4]

"It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a con-

tract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored."

The solicitors were therefore not at liberty to vary the agreement either on one side or the other, but only to put in more formal and professional shape the agreement which had been completely formed: *Rossiter* v. *Miller*.[5]

Lest I be accused of an oversight, I must now advert to the arguments of Mr. Lim Cheng Poh for the defendants. He argued that not all the terms had been agreed between the parties. In particular, he contended that there was uncertainty, as to to the subject matter, as to what if any compensation was to be paid to the deceased, and no agreement as to who was to pay for survey and subdivision fees or what was to happen in the event of rejection by the relevant authority of the plans for subdivision and finally, that the defendants being a family company would not agree to an undivided share being transferred to the plaintiffs. He also drew attention to the provisions of section 214(1)(a) of the National Land Code 1965 which prohibits the transfer of part only of alienated land. There was also, he argued, the evidence of Haji Karim, the appraiser, that the land concerned was subject to the Land Conservation Act 1960, which would necessitate an application to the State Executive Council for excission. That application, he said, might not be approved.

In the case of *Hussey* v. *Horne-Payne*[6], there were certain letters which apparently constituted a complete contract, but on looking into the whole correspondence it was found that those letters did not contain *all* the terms of the contract. It was held that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to show that the contract was not complete.

In the present case, however, there was no evidence of subsequenct negotiations regarding any of the matters referred to by Mr. Lim Cheng Poh. This is amply borne out by the defendants' solicitors' letters of repudiation and the testimony of Mr. Peter Oon to which I shall now refer.

First, there was the defendants' solicitors' letter dated August 20, 1979 intimating that the deal was off and giving as their reason for this the fact that no agreement of sale had been entered into, referring, no doubt, to a formal written agreement. Secondly, in their very next letter dated May 21, 1980, addressed to the solicitors for the deceased, they said that the directors of the defendants did not agree to the sale of the land concerned to the deceased. Thirdly, in their subsequent letter dated June 10, 1980 they gave a different reason, namely, "that any agreement made between our respective clients has been cancelled by your client's failure to comply with the request to pay the balance of the purchase price before 4th July 1979", though they did repeat that no agreement had been entered into.

I now turn to consider the evidence of Mr. Peter Oon, the solicitor who had charge of the matter on behalf of the defendants. He confirmed that according to his instructions, there had been an agreement. He further confirmed that despite late payment by the deceased of the balance of the purchase price, he had been instructed by the managing director of the defendants to draft the sale and purchase agreement. He added that when he said in his letter of June 10, 1980 that no agreement had been entered into he meant "no formal written agreement". He also said that apart from the reasons mentioned in his letter to the solicitors of the deceased for not going through with the sale, he could not recall what other reasons there were.

It is manifestly clear that there was no evidence that the parties were unable to agree about any of the matters mentioned by Mr. Lim and if, indeed, they were unable to agree on any of these matters I would have expected him to have asked Mr. Peter Oon questions regarding this. Moreover, the contemporary correspondence which I have reproduced above says nothing of the sort nor, for that matter, was Mr. Foo Meow Fong, the then managing director of the defendants, called to testify. I, therefore, find upon the evidence before me, that there is nothing to show that subsequent to the crucial letters constituting the contract, there were any negotiations for an important term of the sale and purchase.

I think I should round off this part of the judgment by referring to the following passage in the judgment of the High Court of Australia in *Cavallari* v. *Premier Refrigeration Co. Ltd.*:[7]

"... while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or 'open' contract not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance."

Accordingly, as to the various points raised by Mr. Lim as not having been dealt with in the correspondence to which I have referred, I would say that here a contract had already been formed and the solicitors were only to carry out details and what were the proper clauses in respect of any discrepancy in the area of the land concerned, costs of survey and subdivision, what was to happen in the event of subdivision not being approved, or an application for the land concerned to be excised from land subject to the provisions of the Land Conservation Act 1960 being rejected; such details being "subject to the jurisdiction of the court as to whether or not the clause objected to was proper or improper". (See *Erdie* v. *Addison*[8].) Perhaps, I should also refer to *Harichand* v. *Govind*[9], a decision of the Privy Council, where their Lordships said at p. 31:

"Here exhibits A and A1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The observation only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document."

I now come to the appropriate remedies.

Just before final address, counsel for the plaintiffs said he was abandoning the prayer for specific performance but did not say why. He accordingly confined the remedy claimed to damages for breach of contract.

In outline, the victim of a breach of contract who has treated the breach committed by the offending party as a repudiation of the contract and has accepted the repudiation can claim damages for the breach. Such a claim would be for the so-called common law damages which in Malaysia fall within the scope of section 74 of the Contracts Act 1950 (Revised – 1974). The case of *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin*[10] supports this proposition, for there Gill J. said:

"It is to be observed that the section is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property. In other words, the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid in the case of contracts relating to commodities."

Speaking about the measure of such damages, he added:

"The normal measure of damages is the market value of the property at the contractual time for completion less the contract price."

In recent times, to offset the effects of raging inflation on the price of immovable property, the court may not apply the general rule as to the measure of damages referred to by Gill J. in the *Central Malaysia Development* Case.[10] So, in *Johnson* v. *Agnew*[11], Lord Wilberforce said at p. 401:

"But this (the rule of assessing damages at the date of completion) is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. In cases where a breach of a contract for sale has occurred and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."

Similarly, in *Malhotra* v. *Choudhury*[12] the court in substituting an award of damages for that of an order of specific performance held the relevant date for the assessment of damages was the date of judgment and not the date of the breach.

Adopting the modern approach, I hold that the relevant date for the assessment of damages, in this case, should be the date of judgment especially since there is no evidence that they would be greater if assessed at the date of breach.

I must next consider the evidence, if any, as to the market value of the land concerned at the date of judgment.

Upon this question, I find the record is barren as to any such evidence.

There being so, I must next consider whether I can form an opinion as to the market value of the land based on public and common knowledge.

In *Datuk Jagindar Singh & Ors.* v. *Tara Rajaratnam*[13] an action for damages founded on the tort of fraud, the only relevant evidence on market value of the land in question was a statement by the plaintiff's expert that there had been a boom in property values during a period up to about 1979. The trial judge expressed the view that it was a matter of public and common knowledge that even if there had been no boom the normal annual rate of increase of land prices had always been generally about 20% a year. He added that this was confirmed by about 700 land reference cases which had come before him over the previous 11 months or so. The Federal Court did not criticize this approach nor did it make any mention of it. In these circumstances, the Judicial Committee of the Privy Council was not prepared to interfere either. Lord Keith of Kinkel observed:

"There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary quite widely from one country to another.

The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge. As to whether or not it is so in Malaysia is a question upon which their Lordships would hesitate to venture an opinion. Then judiciary of Malaysia are the persons best qualified to answer the question."

In the present case, the contract was concluded on July 23, 1979. Ordinarily, I would therefore have assessed the increment in value of the land concerned at 20% p.a. from that date. However, it is a matter of public and common knowledge that since the last three or four years the country has been experiencing a severe economic recession as a result of which land values have plumetted. But, I have no evidence before me as to the extent of the decline in such values nor am I in a position to form an opinion as to this based on public and common knowledge. The inevitable conclusion I have arrived at, so far as this part of the case is concerned, is that whilst the fact of the loss of bargain is shown the necessary evidence as to its amount has not been adduced.

This brings to my mind the famous words of Lord Goddard in *Bonham-Carter* v. *Hyde Park Hotel*:[14]

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it."

Thus, in *Ashcroft* v. *Curtin*,[15] a plaintiff claiming for diminution in the profits of his one man business could not succeed in this claim though the evidence pointed to a decrease in profitability which was due to the injury, the records kept being too rudimentary and the accounts too unreliable to quantify the loss.

In these circumstances, I would award the plaintiffs only nominal damages. In the words of Maule J. in *Beaumont* v. *Greathead*:[16]

" 'Nominal damages' means a sum of money that may be spoken of, but has no existence in point of quantity."

They do not, however, mean small damages (per Lord Halsbury in *The Mediana*[17] and their amount could be miniscule. Nevertheless, their practical function is twofold; first, it is the means of establishing, determining or protecting a legal right (*Anglo-Cyprian Agencies* v. *Paphos Wine Industries*[18]) and, secondly, in the picturesque phrase of Maule J. in *Beaumont* v. *Greathead*[16] "a mere peg on which to hang costs".

Accordingly, I award the plaintiffs $500 nominal damages for breach of contract.

Be that as it may, the deceased had paid the sum of $60,000 for a consideration which had wholly failed. I would, therefore, further order the defendants to refund this sum to the plaintiffs.

The next question is the matter of interest.

Now, although the defendants had evinced an intention by their solicitors' letter dated May 21, 1980 not to proceed with the sale, it was not until October 24, 1984 that the plaintiffs caused their writ to be issued. What were the reasons for the inaction and delay of more than four years in the institution of this suit? None were vouchsafed to this court. Nevertheless, the fact remains that the plaintiffs have had the use of the money since the date of payment. Section 11 of the Civil Law Act 1956 empowers the court to award interest on debts or damages at such rate as the court thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of the judgment. Order 42 rule 12 of the Rules of the High Court provides that every judgment debt shall carry interest at the rate of 8% p.a. from date of judgment until satisfaction.

In all the circumstances, it would be right and fair to award interest at the rate of 8% p.a. upon the nominal damages of $500 from August 20, 1979 that being the date of breach, upon the deposit of $6,000 from January 17, 1979 and on the balance of $54,000 from July 23, 1979 until today and I so order. It goes without saying that the total decretal sums will attract interest at the rate of 8% p.a. from today until realization.

Finally, the defendants must pay to the plaintiffs the costs of this action.

*Order accordingly.*

Solicitors: *Lim Kean Siew & Co.; Lim Cheng Poh, Lim & Rahim.*